

O59HWo10

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 UNITED STATES OF AMERICA,

4 v.

24 Cr. 91 (GHW)

5 VADIM WOLFSON,

6 Defendant.

Oral Argument

7 -----x
8
9 New York, N.Y.
May 9, 2024
3:10 p.m.

10
11 Before:

12 HON. GREGORY H. WOODS,

13 District Judge

14 APPEARANCES

15 DAMIAN WILLIAMS

16 United States Attorney for the
Southern District of New York

17 BY: EMILY SARAH DEININGER

DAVID RUSSELL FELTON

Assistant United States Attorneys

18 K&L Gates LLP

19 Attorneys for Defendant

20 BY: DAVID RYBICKI

ROBERT SILVERBLATT

O59HWo1O

(Case called)

MS. DEININGER: Good afternoon. Emily Deininger on behalf of the United States, and I have at counsel's table with me my colleague David Felton.

THE COURT: Thank you. Good afternoon.

MR. RYBICKI: Good afternoon, your Honor. David Rybicki for Vadim Wolfson. With me at counsel table is my colleague Robert Silverblatt.

THE COURT: Thank you very much.

First, just noting the defendant is not present. Counsel for defendant asked for leave not to appear here at this conference where we will be discussing legal matters. I granted that application separately.

We're here to talk about the application by the defendant regarding modifications to the filter team procedures and an application for an injunction pending ruling on the application. I've reviewed your submissions, counsel. I have a number of questions for you. I'm happy to open the floor to both of you, that is, both for the government and the defendant, for any comments that you'd like to share. That would be helpful. But let me just start off with just a couple of brief notes of things that are on my mind, and we'll be able to drill down on these, or any other issues, after I've heard from each of the parties.

The first issue that's on my mind is this: I don't

O59HWo1O

1 have any facts at this point. I have the parties' briefing,
2 but none of it is supported by affidavits or other evidence.
3 So that is on my mind. I don't know what the factual record is
4 upon which I would be making a determination here because I
5 have no facts.

6 Second, I want to hear more about the legal authority
7 for the Court to impose the kind of constraints that counsel
8 for defendant has requested here. There's an application for a
9 preliminary injunction, I'll call it, pending resolution of the
10 other issues, that is, pending a determination by the Court
11 that would frame how the government must conduct this filter
12 process. But there is a lack of independent legal authority
13 for the Court's shaping of the government's filter process
14 apart from that application for provisional relief.

15 So the two top-level issues that are on my mind, and I
16 have a number of others, are what can I do at this point
17 without evidence, and what's the legal authority here for me to
18 direct the government to modify its filter teams, given that
19 the way it's briefed, it's presented to me, that the
20 preliminary injunction request is for provisional relief
21 pending a determination by the Court that would constrain the
22 government's process.

23 So those are just two issues that I had on my mind.
24 There are a number of others. Let me turn it over to the
25 parties. I'll hear any argument from you, and then I will ask

O59HWo10

1 other questions as we proceed.

2 Let me hear first from counsel for defendant.
3 Counsel.

4 MR. RYBICKI: Yes, your Honor. Thank you. I'm happy
5 to address your issues. I'd like start with the second issue
6 related to legal authority.

7 As we've stated in our motion and reply brief, there
8 is both circuit authority in multiple federal circuits and
9 district courts throughout the country which have examined the
10 procedures by which the government examines potentially
11 privileged materials that it obtains in the course of its
12 investigation. We are not challenging the government's use of
13 a filter team, per se. The government has correctly observed
14 that filter teams have widely been used in this district and in
15 others. However, the procedure by which a filter team reviews
16 and releases potentially privileged information is one that has
17 been widely addressed by district courts. What we refer to as
18 the requirement for a pre-review protocol has been endorsed and
19 required by federal courts outside of this district and has
20 been permitted and, in fact, endorsed by the U.S. Attorney's
21 Office in this district previously.

22 What that process looks like, at a high level, is any
23 materials that the government provides to the filter team must
24 also be provided to the defendant in the first instance so that
25 the defendant has an opportunity to both review —

O59HWo1O

1 THE COURT: I'm sorry. Before you go down that path,
2 let me just back up.

3 A number of the cases to which you point me involve
4 things like grand jury subpoenas or are presented to the courts
5 in the context of a discovery dispute. So the courts are
6 looking at it through those rules, interpreting what the
7 procedures are that were established in the subpoena or in the
8 warrant or looking at the government's process in the light of
9 discovery or in the context of a motion to suppress. Here, I
10 don't know which of those frames applies. That's what I'm
11 looking for. What's the, I'll call it, framing through which
12 I'm looking at this application from your perspective?

13 MR. RYBICKI: I suppose we could call it a discovery
14 framing, your Honor, which is analogous to the Eleventh Circuit
15 case *In Re Search Warrant* that we've cited in the motion, which
16 is quite analogous and held that a prereview process was a
17 necessary aspect of a government filter team precisely for the
18 reasons that I was explaining, that without a defense
19 prereview, the government is the sole arbiter of making a
20 privilege determination. And without the prereview,
21 essentially, the filter team independently makes a
22 determination of privilege or no privilege and then directly
23 provides what it has determined not to be privileged
24 information to the case team.

25 The risk there that the Eleventh Circuit recognized is

O59HWo10

1 obvious, and it's a risk that has already, in fact,
2 materialized in this case. That comes to the factual support
3 that your Honor also referred to, and the risk is this: That
4 the government's filter team doesn't get it right and
5 erroneously releases privileged information directly to the
6 case team without giving the defense the opportunity to object.

7 The Eleventh Circuit, the Sixth Circuit, and many
8 district courts throughout the country have found that, for
9 that reason, filter procedures which do not permit for
10 prereview are insufficiently protective of the defendant's
11 rights and of the attorney-client privilege, and that's the
12 procedure that the government is using here, your Honor. The
13 procedure is, essentially, the filter team, unilaterally and
14 without any supervision from a judicial officer or allowing the
15 defense to object, makes a privilege determination, in the
16 first instance, and then relegates all information which they
17 have determined to be nonprivileged to a production batch that
18 goes directly to the government, and so the defense does not
19 have access to any of that information until the government
20 receives it and produces it to us, which is what has happened
21 here.

22 Anecdotally, once we have received this information,
23 we anecdotally conducted some searches of this information
24 ourselves. We're happy to support what we have done with
25 factual affidavits that can be entered into the record for your

O59HWo10

1 Honor's consideration. But within a few minutes of conducting
2 very rudimentary searches, we discovered privileged information
3 or information that certainly should have been classified as at
4 least potentially privileged, namely, hundreds of attorney
5 communications from one of the Gannon Bond nonprivileged
6 subpoena return batches that the government produced to
7 defendant Wolfson back in April.

8 More recently, the government has produced what it
9 characterized as a nonprivileged subpoena return batch to
10 Mr. Wolfson on May 3 following our submission of the reply
11 brief in this matter. Again we conducted anecdotal searches
12 using, essentially, common search terms that we selected at
13 random, in this case an attorney's name, and we discovered
14 privileged material in what the government purports is a
15 nonprivileged production set.

16 So I don't know if there is an implementation flaw or
17 a design flaw in the government's protocol, but privileged
18 information in the form of attorney communications, emails,
19 texts are going through the filter team, being labeled as
20 "nonprivileged," and being produced directly to the government.
21 This is exactly the kind of harm that federal courts have
22 stated can arise when a prereview step is not included in the
23 government's filter team protocol.

24 THE COURT: Thank you.

25 Let me ask you, counsel, in your reply you describe

O59HWo1O

1 what it is you want to prereview and describe it as collections
2 from sources where potentially privileged materials are likely
3 to be prevalent, such as emails and text messages seized from
4 the defendant or his agents.

5 Counsel for the United States is taking the position
6 that that kind of prereview is too expansive, and they've
7 pointed me to at least one case where the kind of materials
8 that were produced to the defendant were limited to what I
9 would describe broadly as communications that implicate legal
10 matters. Whether that's captured by the attorneys' names or
11 would be captured by search terms or something else, I don't
12 know at this point.

13 But do you have an argument for why it is, in the
14 context of the review of records maintained by a nonlawyer,
15 that review of all of the records should be permitted before
16 they're handed over to the case team as opposed to some defined
17 subset of documents that implicate, I'll call it, legal matters
18 broadly speaking? I'm not trying to define that now, but how
19 do you respond to that argument by the government?

20 MR. RYBICKI: Yes, your Honor. The risk is,
21 obviously, most acute when the government is, for example,
22 executing a search warrant of a law office in which it is
23 virtually certain that the government will be seizing ample
24 amounts of privileged legal matter. We respectfully submit
25 that the criterion the Court should focus on is not whether

O59HWo10

1 information is collected from a lawyer but whether the
2 information itself being collected is likely to implicate
3 privilege concerns, and that is the analysis that this Court
4 used in the *Grant* case, which involved collection from a
5 nonlawyer and has been employed in other cases outside of this
6 district. So the relevant criterion is focused on protection
7 of the privilege, not the identity of the custodian or
8 repository from which the information originated.

9 We submit here that it's, I think, probably pretty
10 likely that if the government and the defendant were to discuss
11 these issues, that we could come to a meeting of the minds on
12 which custodians and repositories contained information that
13 would be likely to contain privileged information. We think
14 it's pretty obvious that Mr. Wolfson's Gmail accounts in which
15 he corresponds with counsel with respect to this matter and
16 many other legal matters in which Mr. Wolfson is involved will
17 contain lots of attorney communications. And in fact, those
18 addresses do contain lots of attorney communications, and
19 hundreds of those have already improperly been released
20 directly to the case team.

21 That's the harm that we're trying to avoid, looking at
22 custodians and repositories that predictably would contain
23 privileged information and having the opportunity to prereview
24 those sources prior to release to the government.

25 THE COURT: Thank you.

O59HWo1O

1 Similarly, if you had the opportunity to discuss these
2 issues in a more granular way with the United States, do you
3 think that, in addition to reaching an agreement regarding the
4 custodian and depositories, that the parties would be able to
5 work toward the identification of search terms or other
6 parameters that could be used to identify that subset of
7 documents that are highly likely to contain privileged
8 information?

9 MR. RYBICKI: Part of the — as we pointed out, your
10 Honor, part of the problem that we are facing is that the
11 government has been completely opaque about its process. We
12 have no idea what its protocol process is, and so we don't know
13 how they're using search terms, what search terms they're
14 using, what manual review entails as they've described it at a
15 high level. If we had some kind of visibility into the process
16 or the substance of the search terms, I think there would be a
17 much higher likelihood that we could come to an agreement on
18 the universe of potentially privileged material. But certainly
19 within that universe has to fall attorney communications of the
20 kind that have been improperly released to the case team, and
21 we are happy to engage in these kinds of conversations with the
22 government to define the universe of those terms.

23 As we've indicated in our motion, the proper audience
24 on the government's side to do that is with the filter team,
25 not the case team, which is not involved in the filter process.

O59HWo10

1 That's not something the government has permitted us to do
2 according to its protocol, so we haven't had that opportunity.

3 THE COURT: Thank you.

4 Counsel for the defendant, is there anything else that
5 you'd like to share? I'm happy to hear anything else that
6 you'd like to offer with respect to the motion.

7 MR. RYBICKI: Your Honor, we have, as I said — I want
8 to be very precise to the Court about what the defense has done
9 in order to reach a conclusion that privileged material has
10 been improperly released by the filter team.

11 We haven't systematically or exhaustively reviewed all
12 of the batches of purportedly nonprivileged information that
13 the government's provided to us. As I said earlier, we have
14 conducted anecdotal searches using what we believe should be
15 obvious and predictable search terms, such as the publicly
16 available phone number of an attorney, the attorney's name; and
17 as a result of bouncing those search terms off of certain
18 batches, we have discovered privileged information in the
19 nonprivileged sets. We're happy to provide those emails and
20 communications to the Court. I have copies today. We are
21 happy to supplement our briefing with affidavits to provide the
22 kind of factual support that the Court may require to make a
23 ruling here.

24 THE COURT: Thank you.

25 MR. RYBICKI: Thank you.

O59HWo10

1 THE COURT: Good.

2 Counsel for the United States, let me hear from you.
3 I'll allow you to take up whatever issues you'd like to raise
4 first, and then I have some questions for you. Go ahead.

5 MS. DEININGER: Yes, your Honor. I do want to address
6 the issues you raised. Before I do, I just want to give a
7 little background here.

8 So the filter review process is something that we use
9 when we receive evidence that we believe is likely to contain
10 materials protected by attorney-client privilege. It is not
11 something that is used for most or even a majority of evidence
12 that we obtain over the course of our investigations. For
13 example, evidence that is obtained by subpoena returns or
14 2703(d) orders is generally — generally, minor some
15 exceptional circumstances — not run through filter review
16 because it is unlikely to contain privileged materials.

17 We are, however, cognizant of the need to use filter
18 review to avoid inadvertent exposure of our prosecution team to
19 privileged materials where we get certain — where we do get
20 access to certain information and try to put that in place if
21 it's warranted. Here, we put filter review protocols in place
22 for all electronic devices and accounts we've seized that are
23 believed to have been used by the defendants, Vadim Wolfson and
24 Gannon Bond.

25 And how the filter review process works is generally

O59HWo10

1 described already in our submission. We've had calls with the
2 defense counsel to walk them through this. We have made our
3 privilege review coordinator available to them. They did not
4 take us up on that until, I think, Tuesday. But we offered to
5 put them in touch with her more than a month ago to walk
6 through more details of the process, and I believe she
7 explained to them more of the process and the search terms we
8 used on Tuesday.

9 Now, again, I just made reference to her, but our
10 filter review process is run by an attorney, our privilege
11 review coordinator. She is not part of any prosecution team.
12 She does not report to any unit chief or even to the head of
13 the criminal division. She reports to our office's ethics
14 adviser, and the purpose of that is to make sure that the
15 filter review process is independent of anything that is going
16 in on the prosecution side.

17 She's assisted by contract attorneys and paralegals
18 and agents as necessary, but we make sure that none of the
19 people who assist her are ever working on our prosecution team.
20 So the prosecution team and the filter team are kept wholly
21 separate. Their primary goal is to segregate out
22 communications with attorneys and other materials that might be
23 potentially privileged so that they can pass other material
24 over to the prosecution team to review for evidence. They do
25 this with the use of search terms. Those search terms include

059HWo10

1 the names of known attorneys and known identifiers, such as
2 email addresses or phone numbers, but it also includes some
3 generic search terms like things like "privileged" or
4 "confidential."

5 It can be an iterative process. For example, it can
6 be — I'm speaking not in the specifics of this facts from this
7 case because I'm not on the filter review, but just my general
8 knowledge and experience is that, say, if a search term is run
9 for an attorney's name, sometimes in looking at an email
10 signature, you might come up with a cell phone number for that
11 attorney that you didn't have, and then they're able to run
12 searches for that cell phone number. So that's why it's an
13 iterative process; it builds on the knowledge of both the case
14 team and the filter team. Only once the potentially privileged
15 materials are segregated, then the rest is released to the
16 prosecution team to review for evidence and responsiveness to
17 the search warrants.

18 In this district, our practice, generally, is that the
19 filter team does not make calls about privilege, whether
20 something is actually privileged or not. Their goal is just to
21 segregate out the buckets that could be considered potentially
22 privileged, and then categorical information consistent with
23 what would be included in a priv log can be provided to the
24 prosecution team, and it is the prosecution team that decides
25 whether and how it is going to litigate the matter of whether

O59HWo10

1 there is actually privileged materials with the defense or
2 target.

3 When an investigation is covert, the filter review
4 process is, naturally, limited by the information that's
5 available to the prosecution team. We may not know of every
6 attorney a target has worked with, and so there are instances
7 where what we've referred to as spills occur, where potentially
8 privileged material is released and not identified by the
9 filter team and makes it to the prosecution team. We have
10 established regular practices for when this happens as well;
11 namely, that as soon as someone on the prosecution side comes
12 across something that they believe to be an attorney
13 communication or potentially privileged, we stop review, we
14 flag it for the filter team, and we have them go back and do
15 additional searches and try to segregate any materials that may
16 have been missed in the first place.

17 Once the case is overt, we often and regularly invite
18 defense counsel to participate in the filter review process to
19 improve its efficiency. That is what we did here. Shortly
20 after the arrest, I think it was actually initially after the
21 initial pretrial conference, we spoke with counsel for both
22 Mr. Bond and Mr. Wolfson and invited them to give us a name of
23 attorneys that we should be — and any other relevant
24 identifiers that we should be looking for and using in our
25 filter review process. It was still ongoing for two particular

O59HWo1O

1 buckets of information, which I will speak to in just a minute.

2 It is, I will say, very routine for defense counsel to
3 provide us with this sort of information. It happens, as far
4 as I'm aware, in almost every case where we reach out and ask
5 for it, we get names and identifiers. Mr. Bond's counsel has
6 provided an attorney list here. Mr. Wolfson, however, has
7 declined to provide any information even with regard to
8 attorneys he is well aware are already known to the prosecution
9 team.

10 So at issue in this case is, really, the filter review
11 with regard to two categories of materials. The first is
12 iCloud accounts that are associated with email addresses that
13 were used by Vadim Wolfson and Gannon Bond. These were
14 obtained pursuant to search warrant in January 2024, before
15 they were arrested.

16 The second bucket is electronic devices that were
17 seized from the defendants at the time of their arrest. These
18 are both categories in which we are doing or attempted to or
19 planning on do filter review before anything is released to the
20 prosecution team because we believe that there could be
21 potentially privileged material in the iCloud accounts or on
22 the devices.

23 I am not aware, and the defendant has not identified
24 anything in particular, beyond those two buckets to which
25 filter review would potentially be appropriate. And I think

O59HWo1O

1 also beyond those two buckets, to be honest, all of the
2 materials have been in our possession and been used by the
3 investigation for quite some time. Those are kind of the new
4 buckets of materials where filter review is ongoing.

5 There are three iCloud accounts that were associated
6 with Bond email addresses and two with Wolfson email addresses.
7 These iCloud accounts were produced to the defendants, in terms
8 of the full data extractions, over a month ago on April 5. So
9 Mr. Wolfson has had the data from his full iCloud sets since
10 April 5, for more than a month. We do not as a prosecution
11 team, still do not, have access to the data from the Wolfson
12 devices, meaning the devices that were seized from him at the
13 time of his arrest. We're producing that data as it becomes
14 available to us. We do expect to produce data from some thumb
15 drives and an iPad that were seized by the end of this week,
16 but at that point that data still will actually not be
17 available to the prosecution team. We're hoping to make it
18 available to the filter team for review.

19 I just want to note that, in light of the pending
20 motions, for right now we've held off on reviewing any content
21 from any of these accounts, from these iClouds, including the
22 nonprivileged material that was released.

23 So, despite having had this data, on May 3, for the
24 first time in his reply brief — the reply brief is the very
25 first time that Wolfson made any — Wolfson's counsel, I guess

O59HWo10

1 I should say, Wolfson's counsel made any allegations to us that
2 potentially privileged material had been improperly released to
3 the prosecution team. He had not ever flagged the issue to us
4 in any other communication, and he still hasn't and does not in
5 his brief identify anything with any specificity. He doesn't
6 provide any description of the materials he believes were
7 missed or doesn't do anything to try and meet the burden of
8 showing that any materials that might have been released were
9 actually privileged.

10 And I want to be very clear here. As soon as that
11 reply brief was filed and we saw it on the docket, we
12 instituted our general protocol for potential spills. We told
13 the agents to stop reviewing. The entire prosecution team
14 stopped reviewing. We had the data returned to the filter team
15 to assess and to try and figure out what issues Wolfson's
16 counsel was referring to in their reply brief.

17 My understanding is that, based on our preliminary
18 review — again, this is without any guidance from Wolfson's
19 team who has not communicated any specifics to us — we have
20 found some potentially privileged material that normally would
21 have been — normally, we would have hoped would have been
22 segregated by the filter team review process. The primary
23 example I'm aware of is a chat text messages between Gannon
24 Bond and —

25 THE COURT: I don't need to hear the detail.

O59HWo1O

1 MS. DEININGER: I haven't seen it. I don't know the
2 details of the messages. All I'm saying is I know it was a
3 chat between a lawyer and Gannon Bond from his iCloud account.
4 My understanding is that it was not identified because it was
5 saved under a generic first name, not a last name, and by cell
6 phone number that we were not otherwise aware of. But that is
7 the sort of information, that cell phone number, that Wolfson's
8 team, knowing these attorneys, could have provided us with, and
9 it would have helped improve the filter team process.

10 Also, my general understanding — again, without
11 knowing any of the specifics of the messages because I haven't
12 seen them — is that they did not appear to be legal in nature.
13 My understanding that means it's things like "can you call me"
14 or "let's schedule lunch."

15 So, again, I just want to be very clear here that,
16 even if there were materials that actually were privileged that
17 were released — and I'm not sure that is true — nothing has
18 been reviewed by the prosecution team. We had agreed not to
19 review any of the Wolfson iCloud accounts until May 6, and we
20 put all review on hold before we reached that deadline on
21 May 3, upon receiving Wolfson's reply brief on these motions.

22 The agents have started a very preliminary review of
23 some of the data from Bond's iCloud accounts, but they have not
24 gone beyond reviewing a few calendar entries and photographs.
25 So we have confirmed that they did not review anything that

O59HWo10

1 appeared to be communications with attorneys, and we advised
2 Mr. Wolfson's team of that earlier this week.

3 I think I mentioned this already, but Wolfson's
4 defense counsel did reach out for the first time on Tuesday
5 asking to be connected to our filter review coordinator. We
6 have facilitated that. We are happy to continue those
7 communications. I understand we spoke and addressed one of
8 their questions yesterday.

9 I think, in sum, for us this process is continuing to
10 work. Reasonable steps are being taken to protect
11 attorney-client privilege, and we're going to continue to do
12 that. Even where materials make it over the wall, we have a
13 process in place that went in effect here. We would prefer to
14 work with Wolfson's counsel to help identify names and
15 identifiers that can make the filter team more efficacious, but
16 there's no authority for what he proposes, which is to provide
17 that information only to the filter team. There is nothing
18 privileged about attorney names and phone numbers and the fact
19 that there is, at a bare minimum, an attorney-client
20 relationship.

21 THE COURT: Can I just explore that?

22 MS. DEININGER: Yeah.

23 THE COURT: So I appreciate the argument, and I've
24 read Judge Kaplan's memorandum endorsement that was provided to
25 me with your briefing.

O59HWo10

1 Accepting, for these purposes, that the defendant
2 hasn't pointed to law that requires that it take place in the
3 way that they've asked, what's the problem with it going
4 forward in the way that they've requested; in other words, why
5 is that problematic to the government? Understanding that the
6 purpose of providing the information to the filter team is to
7 assist the filter team, and understanding that if something is
8 withheld as privileged as a result of the filter team's review,
9 the privilege log will contain that information and will be
10 provided to the case team at that time, why does the case team
11 need this information? What's the value to the government?

12 MS. DEININGER: I just want to make sure I'm
13 addressing the correct issue. Are we talking specifically
14 about the attorney names, essentially?

15 THE COURT: Yes. Yes.

16 MS. DEININGER: I think the concern there is that, at
17 least in this district, it is not our filter team that
18 generally litigates whether it is appropriate for a name to be
19 on a list. And, again, I'm certainly not asserting that
20 Wolfson's counsel has put anyone inappropriate on the list.
21 They have not given us any list at all. But I'm aware of other
22 cases in which people have identified consultants and
23 accountants and other third parties on attorney lists, and in
24 those cases, it would — it is our practice for the prosecution
25 team to be the one to litigate whether they would actually be

O59HWo10

1 properly within the scope of a privilege. By providing —

2 THE COURT: That makes sense, but let me just ask
3 about that. Why would the defendant's proposed approach change
4 that result? In other words, if the defense counsel, who I
5 assume will be working ethically, assuming that the defense
6 counsel gave an overinclusive list and that resulted in the
7 filter team withholding more information, I would understand
8 that the government would be able to then litigate the
9 propriety of those names when you're looking at the privilege
10 log, and at that point could say that the list that was
11 provided was overinclusive because, for example, this person is
12 an accountant and not a lawyer.

13 Can you respond to that and let me know more what the
14 view of the government is.

15 MS. DEININGER: I don't think that — the biggest
16 drawback to that process that they propose is one of time.
17 What they're proposing is to have our filter review team do its
18 work, then they essentially get a second check or veto to go
19 over the nonprivileged set that our filter team proposes to
20 produce, and then to create a privilege log. That is a process
21 that could take months for evidence that we have validly
22 obtained by search warrant.

23 I think what we would propose — and I want to
24 actually — I think there's very little daylight between what
25 we would propose and what they're asking for. We have taken a

O59HWo10

1 pause on our substantive review. They have all the iCloud
2 data. They have a period —

3 THE COURT: Thank you.

4 I've got that note. That is going to be one of my
5 questions for the defense, why they can't just review the
6 extraction and let you know what is on their list.

7 MS. DEININGER: And that would be our proposal. Have
8 them have a reasonable period of time, say, two weeks, to
9 review it and tell us what attorneys and what identifiers are
10 in there that we should be looking for so then our filter team
11 can just do its review with full information. To the extent
12 that they've been worried about disclosing attorney names, it
13 appears to be a concern about giving us names that would not be
14 in the dataset, and that would also eliminate that potential
15 issue. They have the dataset for the iClouds. They will
16 have the dataset for the cell phone and the iPads as soon as
17 we're able to produce it. We can agree to a reasonable period
18 in which they get to go through and figure out what attorneys
19 they need to let us know about and then just let our filter
20 team run its process. I think that's what we'd propose.

21 THE COURT: Thank you.

22 Let me just pause you. When you say "tell us," do you
23 mean tell us, the case team, or tell us, the filter team?

24 MS. DEININGER: Both. I mean, again, if this is names
25 of attorneys and phone numbers, I don't think we believe that's

O59HWo10

1 privileged in any reason. And it's in the dataset. I don't
2 think there's any reason for that to only go to the filter
3 team. It speeds up our review of making sure that the names
4 they're suggesting are appropriate.

5 THE COURT: Thank you. Good. I'll hear from the
6 defendant about that proposal.

7 Counsel for the United States, anything else that
8 you'd like to share? I have a couple of questions for you
9 before I turn to the defendant to hear their response to that
10 proposal, but I don't want to cut you off. Is there anything
11 else you'd like share?

12 MS. DEININGER: I think the only other thing I'll
13 emphasize — and this sort of gets into process and the fact
14 that we are willing — again, if there are, like — we have
15 offered to put them in touch with our privilege review
16 coordinator if there are items that they think are going to be
17 specifically tricky to identify, and I think that would include
18 if they have specific search terms they want to propose, we are
19 willing to consider that.

20 THE COURT: Thank you. Good. That's helpful.

21 So just a couple of brief questions for you, counsel
22 for the government. The defendant framed the legal issue for
23 me as a discovery-related issue, which I understand to mean I'm
24 operating under Rule 16(d). Is that the government's view,
25 which is protective or modifying orders and regulating

059HWo10

1 discovery. Again, I'm just looking for the correct legal frame
2 through which I should be looking at this question.

3 MS. DEININGER: I don't know, to be honest, if this
4 would fall under Rule 16, which generally just governs what
5 we're required to produce. I don't think this is a case where
6 they're alleging that we are not adequately producing to them.
7 We're being very careful to produce the full sets to them.
8 They have more data than what I have access to on the
9 prosecution team.

10 THE COURT: What do you think the right legal
11 framework is, then, for the Court's assessment of this
12 question? In other words, what does the defendant have to show
13 in order for me to grant him the relief that's being requested?

14 MS. DEININGER: I think at this point it would be an
15 issue of whether we are purposefully attempting to interfere
16 with the attorney-client relationship, whether there is a Sixth
17 Amendment violation, and I do not think there is any evidence
18 of that here at all. We are taking every reasonable step we
19 can to protect it, unless — or it would be a question of
20 whether we are complying with the terms of the search warrant
21 themselves.

22 THE COURT: Thank you.

23 That's the frame of which many of these cases come at
24 it, which is, is the government complying with the terms of the
25 search warrants themselves?

O59HWo10

1 I don't have the search warrants, which is part of the
2 record that I'm lacking here. To the extent that that is one
3 of the questions that I'm supposed to respond, it's one of the
4 reasons why I raise the, I'll call it, lack of factual
5 predicate for a decision here at the outset, because I don't
6 have the warrants and I don't know what constraints, if any,
7 were imposed on the government in those.

8 MS. DEININGER: We're happy to produce them after this
9 to the Court if you think that would be helpful. My general
10 recollection is that they allow us to search all electronic
11 data in these accounts or on these devices, and that our search
12 warrants, as I actually think is fairly standard in this
13 district, do not provide for specific filter team protocols.
14 This is all protocol that we have added in an abundance of
15 caution after the return was obtained.

16 THE COURT: Thank you.

17 One of the other factual issues that I was curious
18 about relates to the search protocol used by the filter team.
19 Here, I accept the government's proffer about what is typically
20 done, and in your letter you describe what the filter team
21 "typically" does. But I don't have evidence of what the filter
22 team is doing here, and that appears to be something that I
23 would want to know in order to be able to assess the extent to
24 which the protocol that's being implemented in fact suffices to
25 protect the defendants' interest in protecting their

O59HWo1O

1 attorney-client privileged information.

2 So among the bodies of facts that I would benefit from
3 knowing about here, should I be asked to rule on this motion,
4 as I understand I am, would be to know what indeed the protocol
5 is. So I just flag that.

6 Counsel for the government, anything else from you
7 before I ask a couple of other questions?

8 MS. DEININGER: No, your Honor.

9 THE COURT: Thank you. Good.

10 Counsel, I appreciate that the government is willing
11 to have your coordinator work with the defendant to identify
12 and clarify the search parameters that they're using to
13 identify privileged information. Is it the government's
14 expectation that the defendant in this case or in other cases,
15 but in this case in particular, would be able to work with that
16 person to develop a series of search criteria that would be
17 applied in making the determination as to whether or not a
18 document is potentially privileged and, therefore, require
19 further review?

20 What I'm trying to figure out, to put it clearly, is
21 whether there's a way for the defendant and the filter team to
22 develop a series of search parameters that would be able to
23 identify, to a reasonable certainty, where there are privileged
24 documents that they should be able to review before the filter
25 team determines that they should be handed over to the

O59HWo10

1 government. So, in other words, whether there's a way,
2 mechanically or electronically, to identify that subset of what
3 I've described generically as potentially legal documents or
4 legally-related documents.

5 Is that something that you expect your coordinator
6 could work with the defendants to develop?

7 MS. DEININGER: I think, your Honor, we are certainly
8 willing to take input from the defendants on what terms would
9 be appropriate, especially if they are case-specific ones that
10 should be considered, especially regarding legal matters that
11 we might not have any specific knowledge of. I'm hesitant to
12 say, in the abstract, that we would agree to a protocol or
13 agree to anything — agree to anything and everything that they
14 would suggest, because I don't know — I just don't know what
15 that would be.

16 I think that, for instance, one thing, my
17 understanding, that's done is some of these generic search
18 terms like, say, running the word "legal," it's often
19 overinclusive, and they will go through and cull out anything
20 that very obviously is not a communication with an attorney.
21 So it is not every hit from a search term that gets segregated
22 out as potentially privileged, although we do try to be
23 overinclusive in making sure that anything that truly could be
24 privileged is gathered. But we are certainly, as I said
25 before, certainly willing to take into consideration their

059HWo10

1 suggestions and implement anything that's reasonable.

2 THE COURT: Thank you.

3 What's the harm to the government if a search is
4 potentially somewhat overinclusive in this context? So assume
5 that the word used is "lawsuit" and it does capture things,
6 that is, is overinclusive. What I imagine would happen, then,
7 is that your filter team would look at them, would determine
8 that they are not privileged, and therefore appropriate to send
9 to the case team. The government, what I understand then would
10 be the filter team, would provide those documents to the
11 defendant for them to review to confirm that the filter team's
12 determination was correct before they'd be provided to the case
13 team.

14 How burdensome is that process, and what's the harm to
15 the government of implementing a system like that?

16 MS. DEININGER: I think, again, that really depends on
17 a question of timing. My understanding is that in other
18 districts where they have tried to implement this, while
19 defense counsel probably in good faith have said that they have
20 — would not take them very much time to get through this
21 review and create a privilege log, it has often created delays
22 of a number of months.

23 So, for example, if the codefendants use the word
24 "lawsuit" somewhere in a chat between each other, the entire
25 chat would have to be extracted. We would not get access to

O59HWo1O

1 that potentially crucial evidence between coconspirators for a
2 period of months in which it is given to defense counsel to
3 review. They might claim privilege over it based on that one
4 communication. We would then have to come to the Court and
5 litigate whether that chat between coconspirators is, in fact,
6 privileged, where, instead, our privilege team — our filter
7 team can take a look and, where it's not a communication with
8 an attorney or anyone arguably within the sphere of
9 attorney-client communication, can say it's not privileged and
10 pass it over the wall to us.

11 THE COURT: Thank you.

12 Has the government, have you, or do you know of a
13 system that would try to address the timing issue? I could
14 envision lots of options. One could be a "speak now" protocol
15 in which after the filter team identified a document, the
16 defense would have a specified amount of time to object to its
17 provision to the case team. If they fail to do so within that
18 amount of time, it could be provided to the case team. So I
19 can imagine circumstances that would protect against that kind
20 of delay if built into the protocol.

21 Are you aware of any system that has been developed
22 with those kind of protections against delay by the defense?

23 MS. DEININGER: I am not aware of any case that has
24 implemented anything like that. And, again, I would say I am
25 not aware of any case in this district that has allowed a

059HWolO

1 defendant a pre-look, a pre-review of materials that have been
2 identified to be nonprivileged. Again, these are materials
3 that, when the filter process is working, there is no reason to
4 believe they have any connection to legal matters or
5 attorney-client communications.

6 I do believe that if such — if there was going to be
7 a prereview, we would strongly request it be along the lines of
8 what you're proposing, which is that once a nonprivileged set
9 is released, the defendant has, say, a week to identify
10 anything, otherwise it's all being released to the prosecution
11 team. But even acknowledging that, I think that would be the
12 best way to do it, I don't think there's any legal precedent
13 for it or need to do it here.

14 THE COURT: Thank you. Understood.

15 Just to outline the parameters of the parties'
16 positions here, I'll call it the easiest case would be a case
17 with an identified or known lawyer, like Attorney-1 and
18 Attorney-2, identified in the reply being in the to/from for an
19 email or other communication. Assuming that the filter team
20 looked at such a communication and determined that it was not
21 privileged, is it the government's position that the case team
22 should be able to look at it notwithstanding, I'll call it,
23 that obvious indicator of a potentially privileged
24 communication without prior review by the defense? I'm trying
25 to get a sense of where your line is drawn.

O59HWo10

1 MS. DEININGER: If it was a communication with an
2 attorney, our filter team would not be making the call that it
3 is not privileged. They don't look at the substance of the
4 communication with an attorney. The only time where they would
5 look at something and say, oh, that's not privileged is, again,
6 an overinclusive search term that hits on things that are not
7 actually communications with the attorney.

8 If a communication with an attorney did make it over
9 the wall to us, that is probably the sort of thing that I would
10 hope, when someone on the prosecution team saw it, we would
11 stop, not review it, flag it for the filter team, and have them
12 go back and rereview. But if there is actually a communication
13 with Attorney-1 or Attorney-2, our filter team would not be
14 making the call of, oh, this just happens to not — to be a
15 communication about a not privileged matter. Our goal is to be
16 producing all potentially privileged matters, meaning all
17 communications with the attorneys and anything that might be
18 covered by attorney work product, to the defendant for them to
19 be making that determination of whether they're actually going
20 to assert privilege or not.

21 THE COURT: Thank you. Good.

22 Just back to the question about communications between
23 the defendant and the government's coordinator. Does the
24 coordinator have the, I'll call it, authority to agree with the
25 defense about the search terms that will be used in reviewing

O59HWo10

1 documents for privilege?

2 MS. DEININGER: I think she would probably confer with
3 us, but she does not need to get approval beyond — from
4 someone else above her to do that, if that's what you're — as
5 long as she believes a search term is reasonable, she can
6 implement it.

7 THE COURT: Thank you.

8 So if the defense and the head of the office, that is,
9 the review office, were able to agree on a series of search
10 terms and parameters, then the defense would be able to rely on
11 that agreement?

12 MS. DEININGER: One minute, your Honor.

13 THE COURT: Yes.

14 MS. DEININGER: Yes.

15 (Counsel confer)

16 THE COURT: Thank you. Good. Thank you.

17 Anything else from the government?

18 MS. DEININGER: No, your Honor.

19 THE COURT: Thank you.

20 Counsel for defendant, let me turn to you for any
21 comments. First, let me ask you about the extraction question.
22 The government has suggested that you don't need to be worried
23 about identifying those lawyers who are in the records that
24 have been extracted and that, therefore, you should feel more
25 comfortable providing that list, that universe of people, to

O59HWo10

1 the case and filter team. I want to hear from you about that.

2 I also want to hear from you about what I'll describe
3 as a separate question, which is whether the fact that you have
4 the full extraction record gives you the opportunity to conduct
5 the kind of prereview that you've asked for, in other words,
6 look at these records now and tell them what you think are
7 privileged without requiring that the government do that work
8 in conjunction with you. Go ahead.

9 MR. RYBICKI: It does, your Honor. To address the
10 latter point that your Honor just made, that's essentially what
11 we're asking, a prereview of the iCloud subpoena returns and
12 all of the devices that I know the government hasn't really
13 worked through yet.

14 THE COURT: Thank you.

15 So if you're willing to do that, how long would it
16 take you to complete that work? The government has paused its
17 work voluntarily. They suggested a couple of weeks. How much
18 time beyond that would you need to have?

19 MR. RYBICKI: Your Honor, I don't know, in terms of
20 the devices, what kind of data volume we're looking at. I
21 would have to have more information from the government before
22 I could give the Court an educated estimate in terms of timing.

23 THE COURT: Thank you.

24 Counsel for the United States, do you have a sense?

25 MS. DEININGER: I don't have a sense for the ones we

O59HWo10

1 haven't produced yet. Again, we don't have access to that
2 data. I do have — I don't have the quantity on me for the
3 iClouds, but, again, that is all data they've had access to
4 for a month.

5 THE COURT: Understood.

6 MS. DEININGER: I think it is — my understanding is
7 that there is a fairly small number of chats. Again, I only
8 know of the — I only know of the level that was produced to
9 us. It's a fairly small number of chats; maybe a couple dozen.
10 There are a number of documents and photographs. But I think,
11 based on the number of chats, if that's the primary concern, I
12 think it would be a matter of someone sitting down for an hour
13 or two, maybe a day or two to figure out whether they're chats
14 with privileged people. Again, I don't have the full list of
15 attorneys that he has worked with, but it would be a fairly
16 simple process, if you had that list in front of you, to run a
17 list of names and see if there are hits on them within the
18 data.

19 THE COURT: Thank you.

20 I understand the government is still working on the
21 extraction from the other devices. Once that has been
22 effectuated, would the government be willing to engage in a
23 similar process with the defense as to them, in other words,
24 give them a short period of time in which to review them and to
25 alert you to documents that they believe to be privileged?

O59HWo1O

1 MS. DEININGER: Yes. If we're talking about producing
2 the full extraction set and giving them a reasonable time to
3 review before our filter team releases anything to us, that is
4 something we are willing to do. Again, we just — our biggest
5 concern here is that we want it to be a reasonable period of
6 time that does not unduly delay what would be our normal filter
7 review process.

8 THE COURT: Thank you. Understood.

9 Let me just say a few words. First, I'm not in a
10 position to rule on this application now. There are two
11 reasons why: First, as I said earlier, I don't have a factual
12 record upon which to reach a conclusion regarding the propriety
13 of injunctive relief. More importantly, were I actually to
14 reach that question, at this point the government has provided
15 reassurance that they don't expect to engage in this review in
16 the near future. What I've heard from both parties today gives
17 me some hope that there's a pathway to a resolution of this
18 through a discussion in good faith between the defense and the
19 government. It sounds as though, principally, that is between
20 both parts of the government, the case and filter team.

21 Here are some of the parameters around which it sounds
22 as though the parties might be able to reach an agreement:

23 First, with respect to the iCloud accounts, I
24 understand that the defense has already had those for about a
25 month, and as a result, they have the opportunity to review

059HWolO

1 those complete extractions and to identify documents that the
2 filter team has to the filter team that they believe to be
3 privileged. And the filter team, I expect, would not provide
4 them under such an understanding between the parties to the
5 case team without providing the defendant an opportunity to
6 litigate their designation of those documents as privileged.

7 Here, the iCloud accounts have been, I'll call it,
8 disclosed to the defense for a month already. It sounds as
9 though a relatively short amount of time might be agreed upon
10 by the parties for the defendant to complete that review. If
11 it is two hours or two days, as the government asserts, that
12 should be a relatively short period of time. I would hope that
13 the parties could work toward an agreement regarding that that
14 would have the defense provide the information to the
15 government within at least two weeks, but I would leave it to
16 the parties to reach a conclusion with respect to that.

17 I would expect that the parties would be able to
18 engage in a similar protocol, or hope to agree to a similar
19 protocol with respect to the other extractions; namely, that
20 the government would agree, with respect to the case team, not
21 to review the documents from it for a limited period of time
22 during which the defense would have the opportunity to review
23 the extraction in its entirety and identify to the filter team
24 only those records that they believe to be privileged. And I
25 would expect that the filter team, again, would not provide

059HWo10

1 such materials to the government until there is an — that is,
2 the case team, before there is an opportunity to litigate
3 whether or not those documents that were designated as
4 privileged were properly designated as such by the defense.

5 So it sounds as though there are reasonable parameters
6 around which the parties could resolve this dispute operating
7 in good faith, and I've heard nothing but that here. So my
8 inclination would be to leave it at that and to set a deadline
9 by which supplemental submissions would be provided to the
10 Court in support of the application for injunctive relief.
11 Those supplemental materials would need to address the issues I
12 raised at the outset; namely, you need to give me facts so I
13 could make a decision based on facts, and you'd need to clarify
14 for me what law I'm looking at to determine the likelihood of
15 success on the merits with respect to any injunctive relief.
16 What law am I looking at? Is it Rule 16? Is it the Sixth
17 Amendment? Is it something that relates to the built-in
18 parameters embedded in the warrants themselves? I don't have
19 that in the current briefing, and I would really benefit from
20 it in order to assess the application.

21 My instinct now is to set a deadline by which those
22 supplemental submissions would need to be presented to the
23 case. Should this dispute remain live, I would have those
24 materials from the defendant be due no later than two weeks
25 from today, the government's would be due a week later, and the

O59HWo10

1 reply would be a week after that. My hope is that those
2 filings won't be needed, however, as the parties will work
3 together to implement this kind of resolution.

4 Is that a fair approach, counsel, first, for the
5 government?

6 MS. DEININGER: Yes, your Honor. I think we are
7 certainly amenable to resolution along the lines of what you
8 just proposed.

9 THE COURT: Thank you.

10 Counsel for defendant?

11 MR. RYBICKI: Yes, your Honor. Our hope and
12 expectation is that supplemental briefing will not be present.

13 THE COURT: Good. Thank you very much for working
14 collaboratively on these issues and raising them with the
15 Court.

16 This proceeding is adjourned.

17 (Adjourned)